IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2007 Session

THOMAS E. BRADY v. KIMBERLY GUGLER

Appeal from the Circuit Court for Warren County
No. 1413 Larry B. Stanley, Jr., Judge

No. M2006-01993-COA-R3-CV - Filed March 27, 2008

Appellant ("Father") appeals the trial court's designation of Appellee ("Mother") as the primary residential parent of their minor child. In declaring Mother the primary residential parent, the trial court also awarded Mother attorneys fees. The issues raised by the father on appeal are threefold: (1) whether the trial court erred by failing to articulate analysis or make findings of fact with regard to the statutory factors guiding custody determinations pursuant to Tenn. Code Ann. § 36-6-106; (2) whether the trial court erred in applying the statutory factors; (3) whether the trial court erred in awarding attorneys fees to Mother pursuant to the parentage statute. Mother asks on appeal for this court to award damages pursuant to Tenn. Code Ann. §27-1-122 due to a frivolous appeal. We have determined that the trial court is not bound to articulate its reasoning underlying a custody decision, the evidence is overwhelmingly in favor of Mother being the primary residential parent, and because this action involved the issue of Father's parentage, the trial court properly exercised its discretion to award attorney's fees to Mother. Further, we have determined that this appeal is not supported by the law or evidence, and thus, is a frivolous appeal. Accordingly, we have determined that Mother is entitled to damages arising from the expenses and costs associated with this appeal. We affirm and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

JEFFREY F. STEWART, SP. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Dana C. McLendon, III, Franklin, Tennessee, for the appellant, Thomas Brady.

Clifton N. Miller and Christopher R. Moore, Tullahoma, Tennessee, for the appellee, Kimberly Gugler.

OPINION

Thomas Brady ("Father") and Kimberly Gugler ("Mother") began their romantic relationship in the early 1990's in Memphis. Both parties subsequently relocated to McMinnville to pursue a business opportunity.[1] Despite never being married, Mother and Father conceived a child, and on July 5, 2002, Mother gave birth to their son, Myles Standish Brady. Soon thereafter, the parties separated, and the child temporarily remained with Mother.

The underlying action was initiated on January 31, 2003 when Father filed a Complaint contending that he was the Father of their son, Myles Standish, and that he was a fit and proper person to have custody of the child. In addition, Father proposed a Permanent Parenting Plan seeking equal parenting time with the child. On February 18, 2003, Mother filed an Answer and therein admitted that Father was the biological father of the child; however, Mother denied that Father was a fit and proper person to have primary custody of the parties' child.

During the next three years, the parties filed numerous motions which are largely irrelevant to this appeal. Among the motions were various attempts to regain property, increase the parties' respective parenting time with the child, and ultimately impede the conclusion of the custody battle.[2] The trial court conducted numerous hearings on various issues, which are also irrelevant to this appeal.

The trial court conducted the custody trial on May 4 and May 25, 2006. During the trial, the parties called numerous witnesses, including experts in the fields of psychiatry and family counseling as well as the parties themselves. Below, we discuss some of the more significant witness testimony and evidence presented at trial.

Dr. William Bernet, a court appointed psychiatrist, testified about the results of his Psychiatric Parenting Evaluation, which he conducted on both parents. He concluded that both parents had a good relationship with the child, and he determined that both parents had strengths and weaknesses. However, Dr. Bernet went further in his evaluation to find in favor of Mother with regard to the following evaluation factors: (1) attitude toward the other parent, (2) mental health, (3) substance abuse, (4) continuity of placement. More importantly perhaps is the fact that in his report, he does not favor Father for any of the evaluated factors. Ultimately, Dr. Bernet concluded that Mother "appears more qualified to be the primary residential parent."

Ms. Melba Mooneyham, an employee of the Department of Children's Services, also testified at trial. Ms. Mooneyham became involved in the matter after Father alleged that Mother was

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[1] Father and Mother later owned and operated "Total Orthotic and Prosthetic Systems, Inc."

[2] Additionally, scattered throughout the proceedings is the record of the fact that Father employed at least five attorneys, which impeded on the timely conclusion of this case. Father also filed numerous motions as "a pro se" litigant, which were critical of the justice system. In one pleading in particular, Father references lawyers being shot outside courthouses, judges' families being murdered, a judge being murdered in his courtroom, attorneys being held hostage, and a judge being shot in his office.

abusing the child. As a result of the allegation, Ms. Mooneyham met with each parent, met with collateral contacts and sources, and compiled a report detailing her conclusions. She found no evidence of neglect or abuse by Mother. Moreover, Ms. Mooneyham testified that the mother appeared to be a very loving parent.

Ms. Mooneyham testified that Father provided her with a myriad of documents relating to his displeasure with Mother and pictures, which Father claimed evidenced abuse by Mother. Ms. Mooneyham, in her report, stated that "[Father] was very defensive throughout the interview. He presented himself as a very powerful, arrogant and demanding person." Overall, Ms. Mooneyham was highly critical of the way that Father had handled the custody situation. In the conclusion of her report, Ms. Mooneyham stated, "[Mother] has been able to start rebuilding her life. She currently has steady employment, Myles attends a licensed daycare and he is a healthy and happy little boy. She loves this child and wants only what is best for him."

On June 2, 2006, the trial court entered an Order making Mother the primary residential parent of the parties' child and awarded child support to Mother. The trial court granted Father parenting time from Friday at 3:30 p.m. until Monday at 8:00 a.m., every other weekend and additional time every Wednesday evening. The trial court also ordered Father to pay fifty percent (50%) of the attorneys fees incurred by Mother. The trial court subsequently entered two supplemental Orders, in which the court, *inter alia*, set the specific child support amount and set the amount of attorneys fees owed by Father at $28,450.

Following the trial, Father filed numerous motions both by and through his attorney and as a *pro se* litigant. Mother also filed motions seeking to have Father undergo a psychiatric evaluation and seeking Rule 11 sanctions against him. On August 8, 2006, the trial court conducted a hearing on the motions. Thereafter, the court entered an Order denying all of Father's post-trial motions, ordering Father to undergo psychiatric evaluation, imposing supervision on Father's parenting time, reducing to judgment additional child support arrearages, and granting Rule 11 sanctions in the amount of $4,090 in attorney's fees against Father.

Father now appeals the trial court's decisions with regard to the trial court's custody determination, pursuant to Tenn. Code Ann. § 36-6-106, and the award of attorney's fees to Mother.

STANDARD OF REVIEW

This court reviews custody and visitation decisions *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols,* 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger*

v. Adelsperger, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). Appellate Courts will not interfere with custody decisions of trial courts except upon a showing of erroneous exercise of their discretion *Mimms v. Mimms,* 780 S.W.2d 739, 744 (Tenn Ct. App. 1989); *Koch v. Koch,* 874 S.W.2d 571, 575 (Tenn. Ct. App.1993).

Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id*. Thus, a trial court's decision regarding custody or visitation will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id*.

ANALYSIS

The first issue for review is whether the trial court erred by failing to articulate any analysis of the statutory factors for a custody determination as found in Tenn. Code Ann. § 36-6-106. The father urges this court to find no presumption of correctness can attach where there is no explicit analysis of the facts. We disagree.

Tenn. Code Ann. § 36-6-106(a) provides:

> In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:
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> (1) The love, affection and emotional ties existing between the parents or caregivers and child;
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> (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
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> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(a)(8), of child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37- 1-602, by one (1) parent, and that a non-perpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;
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> (4) The stability of the family unit of the parents or caregivers;

(5) The mental and physical health of the parents or caregivers;

(6) The home, school and community record of the child;

(7)(A) The reasonable preference of the child if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, as defined in §§ 39-15-401 or 39- 15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and such person's interactions with the child; and

(10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a) (emphasis added).

It is undisputed that the trial court failed to make specific findings or articulate any analysis of the factors found in Tenn. Code Ann. § 36-6-106 in the Order designating Mother as the primary residential parent. The trial court did, however, *consider* the factors as required by the statute. In pertinent part, the trial court stated the following:

> After considering the factors set out in Tennessee Code Annotated § 36-6-106 with regard to custody of the parties' minor child, Myles Standish Brady, this Court finds that the mother is the proper person to be the child's primary residential parent.

We agree with Father that the trial court is statutorily bound to consider the factors set forth in Tenn. Code Ann. § 36-6-106(a), which it clearly did; however, there is no statutory language

requiring articulation of the factors or expressed findings of fact, nor is there common law requiring such. Simply put, there is no legal basis to support Father's contention.

Morever, the Eastern Section of this Court ruled on this specific issue last year in *Minton v. Fox*, No. E2005-02740-COA-R3-CV, 2006 WL 3017885, at *6 (Tenn. Ct. App. Oct. 24, 2006). The Court stated:

> The first issue we will discuss is whether, due to the Trial Court's lack of any detailed factual findings, the standard of review is de novo with no presumption of correctness accorded to any of the Trial Court's findings. In *Burnett*, *supra*, we emphasized that we "strongly encourage" trial courts to be as detailed as possible when making findings regarding child custody. *See Burnett*, 2003 WL 21782290, at *6. Unfortunately, our encouragement is not always heeded, as in the present case. Having said that, in *Burnett* we also pointed out that while the relevant statute "does require a trial court to consider all of the listed factors which are applicable ..., the statute does not require a trial court, when issuing a memorandum opinion or final judgment, to list every applicable factor along with its conclusion as to how that particular factor impacted the overall custody determination." *Burnett*, 2003 WL 21782290, at *6. *See also Joiner v. Griffith*, No. M2003-00536-COA-R3-JV, 2004 WL 1334519 (Tenn. Ct. App. June 14, 2004), perm. app. denied Oct. 11, 2004 (pointing out that only the eighth factor set forth in Tenn. Code Ann. § 36-6-106(a) requires a trial court to make detailed findings of fact).

Minton v. Fox, 2006 WL 3017885, at *6 (footnote omitted).

As an intermediate appellate court, it is our duty to construe the intent of the legislature and to "ascertain and carry out the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993). Accordingly, we are confident that had the legislature intended for the trial judges to articulate its analysis of the statutory factors, it would have so provided as it has in other instances. For example, in termination of parental rights cases, the court is under an affirmative duty to make findings of fact. *See* Tenn. Code Ann. § 36-1-113(k) (stating that the court shall enter an order that makes specific findings of fact and conclusions of law). Tenn. Code Ann. § 36-6-106(a), however, provides no express requirement.

It is also significant that the Tennessee Rules of Civil Procedure afford a party the opportunity to request that a trial judge make findings of fact and conclusions of law. *See* Tenn. R. Civ. P. 52.01 (stating that in all bench trials, the court shall find the facts specifically and shall state separately the conclusions of law if so requested by any party prior to the entry of judgment). In the instant case, Father failed to avail himself of this remedy.

We find no error with the trial court's "failure" to articulate any analysis of the statutory factors for a custody determination because there is no requirement that it must do so.

APPLICATION OF TENN. CODE ANN. § 36-6-106

The second issue for review is whether the trial court erred in the application of Tenn. Code Ann. § 36-6-106 regarding the custody of the parties' child. Father contends the trial court improperly applied the statutory factors. We disagree.

Overall, we conclude there is more than adequate evidence to support the trial court's decision to award Mother the designation of primary residential parent. As previously noted, we will set aside a trial court's decision regarding custody or visitation only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88. We have concluded that the trial court's decision regarding the custody of the parties' child is a reasonable result of the court's application of Tenn. Code Ann. § 36-6-106 to the evidence in the record. Consequently, we find no error with the trial court's decision.

ATTORNEY'S FEES: TRIAL COURT PROCEEDINGS

In the last issue raised on appeal, Father contends the trial court erred in awarding attorney's fees to Mother. The trial court is given wide discretion in awarding attorney's fees and expenses. *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987). This court will not interfere with the trial court's award unless there is an abuse of discretion. *Id*. A trial court abuses its discretion only when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *State v. Shirley,* 6 S.W.3d 243, 247 (Tenn Ct. App. 1999).

Father's appeal implies the attorney fees incurred by Mother were in regard to the "domestic partnership" litigation between the same parties. There is no such evidence of this in the record. This case is clearly one of paternity, parenting time and support that led to three and one-half years of litigation and this appeal.

Mother relies on Tenn. Code Ann. § 36-2-311 in support of her request for attorney fees. This statute says, in part:

> Upon establishing parentage the court shall make an order declaring the father of the child. This order shall include the following:
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> ***
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> (9) Determination of the custody of the child pursuant to chapter 6 of this title;
> (10) Determination of visitation or parental access pursuant to chapter 6 of this title;
> (11)(A) Determination of child support pursuant to chapter 5 of this title;
>
> ***

> (14) Determination of the liability for counsel fees to either or both parties after consideration of all relevant factors.

Tenn. Code Ann. §36-2-311.

The trial court stated in its ruling:

> While this suit was initiated as a custody action, all parties acknowledged that paternity would have to be established prior to any determination being made regarding the custody of the parties' minor child. . . . The Plaintiff initiated this action January 31, 2003, and then hired and fired several attorneys, all of whom this Court considered to be competent and who performed valuable services for the Plaintiff, which resulted in the delay of the resolution of this matter. Additionally, the Plaintiff repudiated an agreement reached between the parties at mediation on the date of its confirmation, resulting in a trial on the merits. After consideration of all relevant factors, this Court finds that the Plaintiff should pay one-half (½) of the attorney's fees incurred by the Defendant in this action.[3]

This case originated between two unmarried individuals who had a child together. Although not contested by the parties, the court was required to establish paternity prior to making any determination of custody, parental access and support. Thus, the suit triggered the parentage statute.

In regard to the worthiness of the award, it should be noted that Father filed an astonishing number of motions through his attorneys and as a *pro se* litigant. Many of these motions caused undue delay and hardship on Mother that was unnecessary.

Regarding the Father's contention that a portion of the awarded fees were incurred in a separate case related to the dissolution of the corporation of which Father was the principal, the record contains an Affidavit of Mother's counsel, Clifton N. Miller, in which he stated that he and his law firm provided legal work amounting to $56,900.61 in attorney's fees related to the instant paternity and custody dispute. Father, however, fails to make reference to any specific evidence to the contrary.

Accordingly, we find no error with the trial court's determination as a matter of law that Mother was entitled to recover reasonable and necessary attorney's fees pursuant to Tenn. Code Ann. § 36-2-311(a)(14). We also find no abuse of discretion in awarding her one half (½) of the fees incurred in the domestic litigation.

ATTORNEY'S FEES: APPELLATE PROCEEDINGS

[3] In a Supplemental Order, Mother was awarded $28,450.31 in attorney's fees, which represented one-half of the $56,900.61 of the total fees incurred in this suit.

Mother raises the issue of whether the Court of Appeals should award damages to her pursuant to Tenn. Code Ann. § 27-1-122 for the cost of appeal. This Court has previously held that "successful parties should not have to bear the cost and vexation of baseless appeals." *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999) (citing *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977); *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989)). Accordingly, the General Assembly, pursuant to Tenn. Code Ann. § 27-1-122, has empowered appellate courts to award damages against parties whose appeals are frivolous, or brought solely for delay. *Jackson*, 6 S.W.3d at 504. The damages awarded by an appellate court pursuant to Tenn. Code Ann. § 27-1-122 may include, but are not limited to, costs and expenses incurred by the appellee as a result of the appeal. *Id*. (citing *Wells v. Sentry Ins. Co.*, 834 S.W.2d 935, 938 (Tenn. 1992)). In full, Tenn. Code Ann. § 27-1-122 provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

We agree with Mother that she is entitled to recover reasonable attorney's fees pursuant to Tenn. Code Ann. § 27-1-122. The issue of law presented in this case is well settled by the case law of this state, and the facts and the actions of the trial judge give no legitimate reason to change the law. The Father failed to timely file the proper transcript and was the subject of two show cause orders from this court for failing to meet deadlines. The trial court made reference to the delays caused by the Father at the trial level and the pattern has continued into this court. Finally, the factual issues raised on appeal support the ruling of the trial court.

Accordingly, the matter should be remanded to the trial court to make a determination as to the amount of fees to which she is entitled. Moreover, Father failed to file a Reply Brief contesting this issue.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Thomas E. Brady.

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JEFFREY F. STEWART, SPECIAL JUDGE